FILE COPY

Supreme Court, U.S.
FILED
MAR 2 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 662

ROBERT CUSHMAN MURPHY, MARJORIE SPOCK, MARY T. RICHARDS, JOHN C. HOMER, GLADYS WEEKES, DAVID KENNEDY, FRANCES P. BERENS, MARY JACOBS, ARCHIBALD B. ROOSEVELT, CHARLES BANKS BELT, FRANK C. REUSCHLE, ELSA REUSCHLE and JANE N. NICHOLS,

Petitioners,

—vs.—

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Defendant,

and

LLOYD BUTLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture, and DANIEL CAREY, Commissioner of Agriculture and Markets of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT BUTLER IN OPPOSITION

ROGER HINDS,
FRANK C. MEBANE, JR.,
Attorneys for Petitioners
95 Liberty Street
New York 6, N. Y.

ROGER HINDS,
of Counsel.

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

Supreme Court of the United States

October Term, 1959

No. 662

ROBERT CUSHMAN MURPHY, MARJORIE SPOCK, MARY T. RICHARDS, JOHN C. HOMER, GLADYS WEEKES, DAVID KENNEDY, FRANCES P. BERENS, MARY JACOBS, ARCHIBALD B. ROOSEVELT, CHARLES BANKS BELT, FRANK C. REUSCHLE, ELSA REUSCHLE and JANE N. NICHOLS,

Petitioners,

—vs.—

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Defendant,

and

LLOYD BUTLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture, and DANIEL CAREY, Commissioner of Agriculture and Markets of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT BUTLER IN OPPOSITION

A basic grievance of the petitioners is the district court's refusal to make adequate findings, and the complete ignoring by the Court of Appeals of their appeal from the order denying their motion under Rule 52(b) of the Federal Rules of Civil Practice for additional findings (Pet. Point V, R. 356a, 338a *et seq.*).

The principal purpose of this reply to the Brief for Respondent Butler in Opposition is to call attention to statements therein of purported facts for which there have been no findings, several of which, of a vital nature, are directly contradicted by testimony adduced by *respondents*.

Thus, at page 4 it is stated that the spraying operation has been "completed", and at page 5 that "petitioners do not challenge the conclusion of both courts below that it is unlikely that there will be a further aerial spraying in the area of petitioners' property". This casually ignores the testimony of respondents' witnesses (the only ones who testified on the subject) summarized, with record citations, at page 12 of the petition, as well as Petitioners' insistent "challenge" in Point III of the Petition, pages 25 to 28.

The alleged mootness developed, if at all, *before* the trial. It was pleaded by respondents as an affirmative defense (R. 28a, 35a). It presented an issue of *fact*, placing a heavy burden of proof upon those who pleaded it (Pet. p. 26). Petitioners moved for findings of fact on that issue, citing respondents' own testimony (Nos. 39, 40, 41, 42, 43, 44 and especially 38, R. 347a and 348a). But the district court refused to make any finding, stating only (R. 334a) that

> "Plaintiffs (sic) have failed to establish the likelihood of further spraying over their properties."

The foregoing is not a finding of fact (*Kweskin* v. *Finkelstein*, 223 Fed. (2) 677, 679, 7th Circ.), especially in view of the well-settled rule as to the burden of proof on the issue of mootness (*U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 632, 633).

This is not the typical situation where the alleged mootness developed pending *appeal*. The Court of Appeals was not authorized to make a finding of fact on the issue of mootness or on any other issue (see cases cited in Point V of the Petition, p. 32, entirely ignored by respondents).

Heedless of the correcting statement at page 31 of the Petition, and of Point V, respondent Butler, in the footnote at page 8 of his reply brief, repeats the Court of Appeals' misstatement that petitioners filed an "amended complaint" containing no reference to their claim for incidental damages. There of course was no such pleading. Several months after the trial they were granted leave, with respondents' consent, to *add* certain allegations, pursuant to Rule 15(b), to conform to the evidence. There was *no* "amended complaint", and no conceivable reason to *add* any allegation concerning incidental damages, since the original complaint demanded them (R. 17a), and ample particulars thereof had been furnished (R. 8a, 3378, 3393, 3406 to 3416) and petitioners had previously moved for findings as to damages, citing respondents' testimony (Nos. 51, 53, 54, 57; R. 350a, 351a) and the entirely undisputed testimony of their own witnesses (Nos. 73, 74, 76 and 78, R. 353a and 354a).

There is not a single finding of fact by the district court as to damages, either as to any one of the petitioners, who claimed and proved them separately and diversely, or as to all of them together. There is merely a Conclusion of *Law* (No. 7, R. 335a) that

> "The plaintiffs have not *shown* that they have suffered damage * * *"

which, even if labelled "Finding of Fact", is not a finding of fact (*Kweskin* v. *Finkelstein*, 223 Fed. (2) 677, 679, 7th Circ., see Point V of the Petition).

It was not the function of the Court of Appeals to make any findings as to the sustaining or non-sustaining of damages (cases cited at page 32 of Petition). Despite its unsupported statement (Pet. p. 14a) that

> "The plaintiffs are not entitled to damages on the record before us."

and its misstatement (R. 14a, 15a) as to what petitioners alleged and claimed as to incidental damages (corrected, Pet. Point IV, pp. 28 to 31), the Court of Appeals recognized (Pet. p. 13a, footnote) that the damage was "*widespread*".

All this is ignored by respondent Butler in his Reply Brief?

The statement is made at page 5 that "a federal official cannot be held liable in tort for acts done in the course of the *performance* of his duties" (italics ours), and cases to that effect are cited at page 8. But the respondent Butler, in spraying the dairy pastures of the plaintiff Nichols, and other pastures in the area, was *not* acting in the performance of any "official duty". On the contrary, it is freely *admitted* that he was thereby violating the explicit instructions of the U. S. Department of Agriculture (R. 259a, 260a, 269a, 245a, 215a, 256a, 301a to 303a). The same is true of his employment of multi-engined planes over villages, instead of using the admittedly effective helicopters, as required by the contract (Deft.'s Exh. Y, R. 223b, 232a, 233a,

1224, 249, 250a, 288). The same is true of respondent Butler's acts in using multi-engined planes "wherever there are trees"

> "* * * right and left over populous villages, projects, small householders and so on" (R. 1224).

No federal officer is immune from personal liability for his torts, when they are done in violation of his official duty and the express instructions of his official superiors. Fortunately for respondent Butler in this case, he is indemnified against damage claims by the contractor (Deft.'s Exh. Y, R. 227b), and the claims are covered by liability insurance (R. 926, 928, 932, 113a).

It is stated at page 5 that the aerial spraying was "within the *statutory* authority of respondents", ignoring the fact that 7 U. S. C. 147a requires that the *State* grant the authority to take any measures at all within its boundaries against the gypsy moth (Pet. p. 1a), and that the only state statute which authorizes co-operation with the federal officers against the gypsy moth is the statute which authorizes the N. Y. Commissioner of *Conservation* to do so (Pet. pp. 2a to 4a).

It is stated, at pages 7 and 8, with respect to damages that concurrent findings of *two* courts below are final in this Court. But, as we have shown, *neither* of the courts below has made a valid finding, as to any one of the petitioners, that no damages were sustained, and both courts have ignored petitioners' motion, and appeal, demanding direct findings, pro or con, on that vital issue.

Respondent Butler, at page 10, stresses the district court's finding (R. 334a) that

> "Mass aerial spraying of an entire area is the only feasible way of attempting to eradicate the gypsy moth"

but overlooks the fact that when the "entire area" does not consist entirely of "large forest areas" infested with a *forest* insect, but to a substantial extent of villages, dairy farms, small homesteads, and suburban developments, the "mass aerial spraying" over *those* areas may admittedly be done by the precision-instrument, the *helicopter*, admittedly without loss of effectiveness (R. 232a, 233a); and that helicopters are *required* by respondent Butler's official superiors "for precise treatment of * * * small villages" (R. 223b). There is no finding that multi-engined planes are "the only feasible way" over the petitioners' dairy pastures and small village holdings; and the testimony of respondents' own witnesses is directly to the contrary.

Indeed, the district court seemed to recognize that fact in its Opinion (R. 324a) contrasting the spraying of "a highly developed and built-up section" with "the spraying of woodlands in the more isolated areas". So does the Department of Agriculture (R. 312a). So does the Court of Appeals (Pet. p. 13a, footnote). But admittedly that is not the "way" the respondent Butler does his spraying (R. 232a, 1224).

It is stated at page 7, in the footnote, that "mootness has been avoided only when the action is by its nature *periodic*". But 8,000 acres in New Jersey (over 12 square miles) were sprayed a second time (R. 211b), and it is admitted (R. 2489) that respondents intend to eradicate the

remaining egg masses on Long Island, but have not determined what means will be employed; and that "the program is not over" (R. 237a). The respondent Butler could readily have stated that under no circumstances would he again violate the instructions of the USDA, and spray DDT on dairy pastures, or employ multi-engined planes over small villages, consenting to an injunction at least to that minimum extent. And, despite the ambiguous statements of the respondent Carey as to *his* future intentions (R. 288a), the district court would have acted well within the limits of the "mootness" decisions if it had, at least, enjoined him from further usurpation of the functions of the Commissioner of Conservation so far as petitioners' uninfested lands are concerned (Pet. Point I p. 20).

CORRECTION: At page 12 of the Petition we cited R. 210b for respondents' statement that

> "* * * it is impossible to predict when plaintiffs' residences and lands will be subjected to DDT again".

The quotation, however, is from respondent Butler's brief in the Court of Appeals, and was followed by the statement

> "* * * and extremely doubtful that it will ever occur."

In any event, we respectfully submit, that is a question of *fact*, as to which there should have been a direct finding, pro or con, by the district court.

Respectfully submitted,

ROGER HINDS
Counsel for Petitioners